IN THE

Supreme Court of the United States

October Term, 1949.

No. 28.

JOHN WALTER OAKLEY, JR., - - Petitioner,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - Respondent.

BRIEF FOR RESPONDENT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX

PAGE

Statement of the Case 1

Summary of Argument 5

Argument 6

1. Petitioner was fully restored to the position he left at the time he was inducted into the military service, plus cumulated seniority, as required by the Selective Training and Service Act of 1940, and is not entitled to the seniority at Corbin, as claimed by him, under the provisions of that Act. 6

2. The rights or benefits conferred upon petitioner by the Selective Training and Service Act terminated with the expiration of the statutory year. . 18

Conclusion 24

CITATIONS.

PAGE

Aeronautical Industrial Dist. Lodge No. 727 v. Campbell, et al., 337 U. S. 521 ..... 1, 6, 7, 8, 17, 18, 23

California v. San Pablo & T. R. Co., 149 U. S. 308 21

Eisler v. U. S., 338 U. S. 189 2

Federal Rules of Civil Procedure, Rule 36 24

Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 ..... 1, 6, 7, 13, 17, 18, 23

Harvey, et al., v. Braniff International Airways, Inc., 5 Cir., 164 F. 2d 521 15

Helvering v. Gowran, 302 U. S. 238 18

Hewitt v. System Federation, et al., 7 Cir., 161 F. 2d 545 15

Railway Labor Act, 45 U. S. C. §151, et seq 22

Raulins v. Memphis Union Station Co., et al., 6 Cir., 168 F. 2d 467 15

Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. §301, et seq 1, 6

Spearmon, et al., v. Thompson, et al., 8 Cir., 167 F. 2d 626; cer. denied Thompson, et al., v. Spearmon, et al., 335 U. S. 822, and Delozier v. Thompson, et al., 335 U. S. 886; opinion clarified, 8 Cir., 173 F. 2d 452 ..... 8, 22

Special Service Co. v. Delaney, 5 Cir., 172 F. 2d 16 ... 15

Trailmobile Co., et al., v. Whirls, 331 U. S. 40 ..... 1, 7, 8, 17, 18, 19, 23

U. S. v. Hamburg-American S. S. Co., 239 U. S. 466 .. 20

Walling v. Shenandoah-Dives Mining Co., 10 Cir., 134 F. 2d 395 20

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This case presents the questions of seniority rights of a re-employed veteran, and of the duration of the protection of such rights, under the provisions of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. §301, *et seq.*). Respondent believes that both questions are fully answered in the opinions of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corporation, et al.*, 328 U. S. 275; *Trailmobile Company, et al.*, v. *Whirls*, 331 U. S. 40, and *Aeronau-*

tical Industrial District Lodge 727 v. *Campbell, et al.*, 337 U. S. 521. The only question before the District Court when it dismissed the action as moot (R. 18) was whether petitioner's seniority at Corbin, Ky., should date from July 18, 1946, the day he first worked there, or July 1, 1945, the day he might have started to work there had he not, at that time, been in the armed forces. Petitioner had not worked at Corbin prior to his service in the armed forces, and had no seniority at Corbin when he entered the armed forces. The ground upon which the action was dismissed injects the further question of duration of the protection afforded to seniority rights by the Selective Training and Service Act of 1940.

When the action was dismissed by the District Court, that Court had before it, in addition to the complaint (R. 1) and the answers of respondent (R. 8) and the Union (R. 16), respondent's request for admissions (R. 4-7), petitioner's response to that request (R. 10-11) admitting all of the facts set out in the request except those denied for lack of information, and the uncontroverted affidavit of H. Feather (R. 12-13), filed in support of respondent's motion for summary judgment (R. 12), establishing the facts which had been denied by petitioner for lack of information.[1]

The facts admitted by all of the parties established, without contradiction, that when petitioner entered

[1] Petitioner, in his brief, asserts that the factual allegations of the complaints must be taken as true. Surely admissions of facts under rules 36 and 56, Federal Rules of Civil Procedure, which were before the District Court and considered by it in dismissing the action as moot are appropriate facts for consideration on appeal. The fact that the question in issue has become moot may be brought to the Court's attention even by suggestion. *Eisler* v. *United States*, 338 U. S. 189.

military service on May 7, 1944, he was working as a machinist at Loyall, Ky., and that his seniority, which dated from July 6, 1943, was confined to that point; that upon his return from military service he was given his old position at Loyall with seniority at that point from July 6, 1943 (R. 5, 13, admissions 14 and 15, and uncontroverted affidavit of H. Feather); that during his absence in military service the respondent's circumstances had so changed as to make it impossible and unreasonable to give petitioner work at Loyall (R. 5, admission 16); that upon his return from military service, because of reduction of working force at Loyall, he was placed on furlough at that point, to be called back to work at that point in accordanee with his seniority at that point (R. 5, admission 18); that, being on furlough at Loyall, he applied "for a job as machinist at Corbin" (R. 4, admission 10), was given that job at Corbin on the day he applied for it and was given seniority at Corbin from that day (R. 4, 5, admissions 10, 12, 13); that the seniority given to him was in strict accordance with Rule 28 of the collective agreement governing his employment (R. 6, admission 23); that had petitioner not been in military service on July 1, 1945, he would have been cut off and placed on furlough at Loyall on that day (R. 5, admission 17), and under the collective agreement could have applied, at any time after July 1, 1945, while on furlough at Loyall, for employment at Corbin and might have been given preference to transfer to that point, or to any other point on respondent's line of railroad, provided machinists were needed at Corbin, or such other point at which he evidenced that he desired employment (R.

6, Rule 26, admission 23); and upon his transfer to Corbin, or any other point, his seniority at Corbin, or such other point to which he transferred, would have dated from the day he first worked at that point (R. 6, Rule 28, admission 23).

This action is not one for a declaration of rights. It is one which is based upon, and in which the jurisdiction of the District Court is invoked under, the provisions of the Selective Training and Service Act of 1940, as amended, to require respondent to give petitioner seniority dating at Corbin from July 1, 1945, because of his employment at Loyall, Ky., and the provisions of the Act, it being claimed that had he not been in military service he might have applied on July 1, 1945, for employment at Corbin and could have been transferred to Corbin on that day. Under the collective agreement, non-veterans on furlough because of force reduction desiring transfer to Corbin, or to any other point, were not entitled to seniority at Corbin, or at such other point, until they actually started working at Corbin, or such other point (R. 6, admission 23). Upon the pleadings, admissions and uncontroverted affidavit of H. Feather, respondent filed its motion for a summary judgment in its favor (R. 12). While that motion was pending, this case was assigned for argument upon the question whether, under the opinion of this Court in the *Trailmobile* case, *supra*, the cause had been rendered moot by the expiration of the statutory year to which Section 8(c) of the Selective Training and Service Act limited petitioner's right to any special or preferential

standing in respect to restored seniority (R. 18). Upon hearing, the District Court sustained the Union's motion to dismiss the cause on the ground that the question presented had become moot (R. 18). The Court of Appeals for the Sixth Circuit affirmed the District Court on the ground that the statutory period had elapsed, and that under the provisions of the Selective Training and Service Act petitioner was not, after that period, entitled to the preferred seniority standing that he claimed (R. 21-23).

SUMMARY OF ARGUMENT.

Respondent contends that the judgment of the District Court, affirmed by the Court of Appeals, is right, and should be affirmed by this Court, for the following reasons:

1. Petitioner was fully restored to the position he left at the time he was inducted into the military service, plus cumulated seniority, as required by the Selective Training and Service Act of 1940, and is not entitled to the seniority at Corbin, as claimed by him, under the provisions of that Act.

2. The rights or benefits conferred upon petitioner by the Selective Training and Service Act terminated with the expiration of the statutory year.

ARGUMENT.

1. Petitioner Was Fully Restored to the Position He Left at the Time He Was Inducted Into the Military Service, Plus Cumulated Seniority, as Required by the Selective Training and Service Act of 1940, and Is Not Entitled to the Seniority at Corbin, as Claimed by Him, Under the Provisions of That Act.

Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 890, 58 Stat. 798, 50 U. S. C., Appendix, Section 308, so far as the facts in this case are concerned, provides that a veteran shall be restored to the position he left when he entered military service, without loss of seniority, unless the employer's circumstances have so changed as to make it impossible or unreasonable to restore him; that the veteran shall be considered as having been on furlough or leave of absence during the time he was in military service; and that he shall not be discharged from the old position to which he is restored without cause within one year after restoration.

The position to which the veteran is required to be restored is the position which he left plus cumulated seniority. He is entitled to his old position even though at the time of his application for reemployment there is no work available. If there is no work available, he is entitled to be recalled to work in accordance with his seniority. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* No new system of seniority was created by the Selective Training and Service Act. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell,*

et al. The Act recognized the existence of seniority systems and seniority rights, and the veteran was given protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for the period of one year. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* Railroading is a unionized industry. Seniority and seniority rights in the railroad industry derive their scope and significance from collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell, et al.; Trailmobile Co.* v. *Whirls; Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* In the *Aeronautical Industrial* case, it is said (337 U. S., p. 526):

> "We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."

When petitioner entered military service he was employed as a machinist at Loyall, Ky. Under the collective bargaining agreement governing his employment his seniority was confined to Loyall. The collective bargaining agreement provides for "point" seniority, *i. e.*, seniority acquired at the point where the employee works. His seniority at Loyall dated from June 6, 1943, the day he started working at Loyall (R. 4, 5, 6, admissions 1, 15, 23). Upon his return from military service he was restored to his old position with seniority at Loyall from June 6, 1943 (R. 5, admission 18). That was a full restoration without loss of seniority as re-

quired by Section 8(c) of the Selective Training and Service Act. That gave to him the seniority he accumulated while he was in military service. That gave to him the same position that he had when he entered military service plus cumulated seniority, and not an inferior position as argued by petitioner. He was not penalized in his seniority but was given full credit for the time he was in military service. He was given the exact status of one who had been "on furlough or leave of absence" but uninterruptedly a member of the working force. That is what the Act required. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell, et al., supra.* The Act protected petitioner from discharge from that restored position at Loyall for one year from the date of his re-employment after his return from military service. After the expiration of that year, petitioner's continued employment depended on the collective bargaining agreement under which he worked, *i. e.*, the contract of employment. *Spearmon, et al.* v. *Thompson, et al.*, 8 Cir., 167 F. 2d 626; cer. denied *Thompson, et al.* v. *Spearmon, et al.*, 335 U. S. 822, and *Delozier* v. *Thompson, et al.*, 335 U. S. 886; opinion clarified, 8 Cir., 173 F. 2d 452; *Trailmobile Co.* v. *Whirls, supra.* His employment was at all times a subject of collective bargaining so far as his seniority was concerned, except that he had to be restored to his former position without loss of seniority and not discharged (or demoted) without cause for one year. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell, et al.*

The seniority at Corbin, Ky., which petitioner commenced to accumulate by starting to work at that point

on his return from military service, was from new employment which he secured by reason of the fact that he was on furlough at Loyall. On July 1, 1945, three machinists at Loyall with more seniority than petitioner were laid off (R. 4, admission 6). They were Pearl M. Shell, with seniority from August 19, 1926; Robert S. Kallem, with seniority from October 4, 1926; and Glen B. Wolfe with seniority from May 13, 1929 (R. 4, admissions 2, 3, 4). (Petitioner's seniority at Loyall was from July 6, 1943.) Shell, Kallem and Wolfe were laid off because of reduction of force at Loyall due to the fact that there was not sufficient work for them at that point (R. 4, admission 6). On the day those three men were laid off and placed on furlough, had petitioner been working at Loyall instead of being on furlough in military service, he would likewise have been laid off and placed on furlough (R. 5, admission 17). The admitted facts establish that the Loyall shops were not transferred to Corbin, and that the placing on furlough of the men senior to petitioner was not due to transfer of the Loyall shops to Corbin, as alleged in the complaint. Machinists senior to petitioner, Shell, Kallem and Wolfe, were employed at Loyall after July 1, 1945 (R. 4, admissions 8, 9). The junior machinist remaining at work at Loyall was Elijah J. Saylor, with seniority from June 27, 1926 (R. 4, admission 5). Shortly before petitioner returned from military service, Saylor was granted a leave of absence on account of serious illness, and Pearl M. Shell, the senior furloughed machinist at Loyall, was recalled to work. Thereafter the machinist work of respondent at Loyall was done by Pearl

M. Shell and the machinists senior to Shell (R. 4, admission 8). When petitioner returned from military service, two of those senior machinists, Robert Kallem and Glen B. Wolfe, who were laid off in reduction of force on July 1, 1945, were still on furlough, and one senior machinist, Elijah J. Saylor, was on leave of absence due to serious illness (R. 4, admissions 7, 8, 9). None of the machinists, Shell, Kallem and Wolfe, who were cut off and placed on furlough at Loyall on July 1, 1945, transferred to Corbin. None of them now has, nor at any time had, seniority at Corbin (R. 5, admission 21). The statement of the Court of Appeals (R. 22) that the machinists from Loyall "were given seniority" at Corbin "as of the date of their transfer" is not supported by the record. Nor is there anything in the record to support the statement of the Court of Appeals (R. 22) that petitioner is claiming that under the Selective Training and Service Act of 1940, he was entitled to seniority as of July 1, 1945, "the date on which the other employes of the company at Loyall transferred to the shops at Corbin." *When this action was dismissed by the District Court, petitioner had his cumulated seniority at Loyall; likewise all of the other machinists who had been laid off by reason of reduction of working force at Loyall and placed on furlough had their seniority at that point. One had been called back to work in accordance with his seniority, and two of them senior to petitioner were still on furlough. Petitioner, too, was then on furlough from Loyall, subject to being called back when needed* (R. 5, admission 18). Petitioner based his right to a job as machinist at Corbin and seniority at that point as of

July 1, 1945, solely upon the fact that had he not been in military service he would have been cut off and placed on furlough at Loyall on July 1, 1945, and that he could have made application on that date for a job as machinist at Corbin and could have accepted the job at Corbin. On July 18, 1946, he made that application (R. 4, 5, admission 10) for "a job as machinist at Corbin," in accordance with paragraph (b) of Rule 26 of the collective agreement, and was given that job the day he applied for it. Rule 26 (R. 6, admission 23) reads as follows:

> "Rule 26. Transfer of Laid-Off Employes.
>
> "26(a) While forces are reduced, if men are needed at other points, furloughed men will be given preference to transfer, with privilege of returning to home station when force is increased, such transfer to be made without expense to the company, seniority to govern.
>
> "26(b) An employee laid off in force reduction desiring to secure employment under this rule shall notify his foreman in writing and furnish his craft General Chairman copy of the letter."

Petitioner's application for "job as machinist at Corbin" was received by the Railroad on July 18, 1946 (R. 4, admission 10). He was immediately employed at Corbin and actually started working there on that day. He was given seniority at Corbin beginning that day, July 18, 1946 (R. 5, admissions 12, 13). That was in accordance with the collective agreement. It provides for "point" seniority and that such seniority "will begin from the date and time the employe starts

to work" (R. 6, admission 23). The work and seniority at Corbin were entirely independent of the work and seniority at Loyall. The machinists at Corbin were not drawn, nor did they necessarily come, from the furloughed machinists at Loyall or at any other point. Seniority could only be accumulated at Corbin by working at that point.

Between July 1, 1945, the day the machinists senior to petitioner were cut off and placed on furlough at Loyall (also the day that petitioner would have been cut off and placed on furlough had he not been in the armed forces), and July 18, 1946, the day that petitioner actually started working at Corbin, five machinists were employed at Corbin. The seniority of each of those men dates from the day each started working at Corbin. They were Vernon C. Vandermark, with seniority from November 26, 1945; N. M. Jenkins, with seniority from April 7, 1946; L. C. Whitus, with seniority from June 5, 1946; L. S. Stansberry, with seniority from June 17, 1946; and G. G. Harp, with seniority from June 26, 1946. When they started working at Corbin, petitioner had no seniority at Corbin (R. 5, admission 21). He was then on furlough at Loyall because of his services in the armed forces.

Petitioner and the five men employed at Corbin were all given seniority at that point beginning from the date and time each man started working there. To give petitioner seniority at Corbin as of a day prior to the day he started working there, would be to give him a preferred standing over the other men. The Selec-

tive Training and Service Act did not give petitioner or any other veteran that preferred standing. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.*

It is not denied that petitioner was restored to his old "position" with cumulated seniority at Loyall. That restoration gave him the seniority he had at the time he entered military service, plus the seniority he had accumulated while in military service. It is admitted that during his absence there had been such a change in circumstances that it was impossible to give him work at Loyall. To give him work at Loyall would have been unreasonable and would have given him a preference over senior machinists (R. 5, admission 16). Under the admitted facts he was not entitled to work at Loyall so long as senior machinists were laid off at that point. In the *Fishgold* case, *supra,* at page 287, this Court said:

> "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his 'position' when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old 'position' or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's 'circumstances have so changed as to make it impossible or un-

reasonable' to restore him. §8(b)(B). He is entitled to be recalled to work in accordance with his seniority. His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The status of petitioner, after being restored to the position he left with cumulative seniority, was that of a machinist laid off because of reduction of force. When he was thus restored to the position he left with cumulated seniority, he was given full "protection within the framework of the seniority system" in effect on the Railroad.

Rule 26 of the collective agreement under which petitioner worked provided that while forces were reduced, if men were needed at other points, furloughed men would be given preference to transfer to points where men were needed. If a furloughed man desired to secure employment under that provision of the agreement he was required to notify his foreman in writing of his desire. That is what petitioner did when

he returned from military service. He now says that he would have made application for work at Corbin when he was first placed on furlough and that he would have accepted such work at Corbin. While there is a probability that petitioner would have applied for work at Corbin when he was laid off at Loyall on July 1, 1945, yet such an assignment was not a matter of absolute right. It was conditioned first, upon men, in this case machinists, being needed at that point, and second, upon petitioner notifying his foreman and General Chairman of his craft in writing of his desire to secure such work. *Cf. Raulins* v. *Memphis Union Station Co., et al.*, 6 Cir., 168 F. 2d 467; *Special Service Co.* v. *Delaney*, 5 Cir., 172 F. 2d 16; *Harvey, et al.* v. *Braniff International Airways, Inc.*, 5 Cir., 164 F. 2d 521; *Hewitt* v. *System Federation, et al.*, 7 Cir., 161 F. 2d 545. It is worthy of note that none of the other machinists laid off at Loyall July 1, 1945, all of whom were senior to petitioner, applied for work at Corbin. Under the agreement the mere fact that a man is laid off by force reduction at one point does not give him seniority rights at any other point. The laid-off man is not required to make application for work at another point at the time he is laid off. He may make such application at any time while laid off (R. 6, admission 23, Rule 26). The employment at the point or points at which laid-off men apply for work under the provisions of Rule 26 is separate and distinct from the employment at their old stations, with separate seniority rosters and entirely separate and distinct seniority rights. The men applying and being assigned to such work retain their old positions, with their old

seniority, and may return to their old or home stations when needed there. At any time while on furlough waiting to be called back when needed, they may secure employment at any other point where men are needed, if they so desire, but respondent cannot require the men to make application for such work. It is wholly voluntary on the part of the men. Their seniority at the point to which they transfer is controlled by Rule 28 of the collective agreement (R. 6, admission 23) which reads as follows:

> "Rule 28. Seniority.
>
> "28(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.
>
> "28(b) Seniority of employe in each craft covered by this agreement *shall be confined to the point employed* for those who perform work as per special rules of each craft in the various departments of the railroad as follows:
>
> "Machinists * * *." (Emphasis added.)

Under that Rule it is clear that petitioner's seniority at Corbin dated from July 18, 1946, the day he first worked at that point after applying for work as machinist at that point. *To establish seniority at Corbin he had to start working at Corbin.* That is the way Chester C. Parrott, Vernon C. Vandermark, N. M. Jenkins, L. C. Whitus, L. S. Stansberry and G. G. Harp established their seniority at Corbin (R. 5, admission 21). Even though they may have transferred from some other point, they did not establish seniority

at Corbin until they started working there. Petitioner was not entitled, by reason of his absence in military service, to a step-up or gain in seniority or priority. He was given all of the rights to which he was entitled under both the Selective Training and Service Act and the collective bargaining agreement under which he worked. He was entitled to no more. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra; Aeronautical Industrial Dist. Lodge 727* v. *Campbell, supra.* To quote again from the Fishgold case, pp. 285, 286:

> "As we have said these provisions [Secs. 8(b) and 8(c)] guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions [Secs. 8(b) and 8(c)] if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied."

See also the *Trailmobile* case, *supra,* at p. 58, reaffirming this construction of the provisions of Section 8 of the Selective Training and Service Act.

From the facts before the District Court it was plain to that Court that petitioner had been fully restored to his former position, plus cumulated seniority, and that any claim of seniority at Corbin as of a date prior to the date he first worked at Corbin was a claim

of preferred standing or "super-seniority" which, if it ever existed, expired at the end of the statutory year. The District Court did not err in dismissing the cause. With the uncontroverted facts in the record establishing that petitioner was fully restored to his old position with cumulated seniority, the judgment of the District Court is correct and should be affirmed. *Helvering* v. *Gowran*, 302 U. S. 238.

2. The Rights or Benefits Conferred Upon Petitioner by the Selective Training and Service Act Terminated With the Expiration of the Statutory Year.

It is perfectly clear that petitioner's seniority rights before he entered the military service, and while on furlough in the military service, were derived from the collective bargaining agreement of September 1, 1943. *Aeronautical Industrial District Lodge No. 727* v. *Campbell, et al.*, 337 U. S. 521. It is likewise perfectly clear that, under Rule 28 of that agreement, petitioner acquired no seniority at Corbin until he actually started to work at that point. Non-veterans working under that agreement could establish seniority at Corbin only by starting to work at that point. Therefore, to give petitioner a seniority status at Corbin prior to the time he started to work at that point would be to give him a preferred standing over non-veterans, which he is not entitled to under the agreement, and which, we insist, he is not entitled to under the law as announced in the *Fishgold* and *Trailmobile* cases, *supra*.

But if, notwithstanding the bargaining agreement, petitioner had been given seniority at Corbin as of July 1, 1945, the date he could have applied for work at that point except for the fact that he was on furlough in the military service, such seniority would have been an extraordinary statutory seniority or standing which terminated at the expiration of the statutory year. That year had expired at the time the judgment of the District Court was entered. As stated by this Court in the *Trailmobile Company* case, at page 59:

> "But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over non-veteran employes, a preferred status which we think not only inharmonious with the basic Fishgold rationalization, but beyond the protection contemplated by Congress."

And at page 60:

> "* * * The only question here and the only one we decide is that §8(c), although giving the reemployed veteran a special statutory standing in relation to 'other rights,' as defined in the Fishgold case, during the statutory year, and creating to that extent a preference for him over non-veterans, did not extend that preference for a longer time.
>
> * * * * * * *
>
> "We find it unnecessary therefore to pass upon petitioner's position in this case, namely, that all

protection afforded by virtue of §8(c) terminates with the ending of the specified year. *We hold only that so much of it ends then as would give the re-employed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.*" (Emphasis added.)

Here the only question is petitioner's seniority rights at Corbin and the duration of such rights under the Selective Training and Service Act. Nothing else was before the District Court when the action was dismissed. Unlike the *Haynes* case, No. 29, petitioner does not claim damages for loss incurred during the statutory year by reason of his not having been given the preferred standing he claims. Petitioner had been employed as a machinist, the position he left at the time he entered the military service, for more than one year after his restoration to his former position with cumulated seniority at Loyall. The question of his claimed extraordinary statutory seniority at Corbin from the date he could have applied for transfer to that point had become moot and was properly so treated by the District Court. Under the facts of petitioner's employment since his restoration, which facts were before the District Court, that Court could make no other finding than that petitioner's rights under the Selective Training and Service Act had come to an end. Any other finding would have been a finding on an abstract proposition, a decision which could not possibly affect the result of the only question in issue in this case. *Walling* v. *Shenandoah-Dives Mining Co.*, 10 Cir., 134 F. 2d 395. In *U. S.* v. *Hamburg-American*

S. S. Co., 239 U. S. 466, this Court had before it a case in which, because of World War I and the applicable law, the only matter in controversy had become moot. In declining to pass upon the abstract proposition, this Court quoted with approval the following from *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

After the expiration of one year from the date that petitioner was restored to his old position without loss of seniority, he not having been discharged or demoted during that one year, petitioner must look to his union for protection of his employment. His rights to employment and seniority after the expiration of the statutory one-year period are rights under the bargaining agreement (contract of employment) and not under the statute.

In *Spearmon, et al.*, v. *Thompson, et al., supra,* the Circuit Court in its clarifying opinion, 173 F. 2d 452, at page 453, said:

> "The statute protected them from discharge from their positions as mechanics for one year from the date of their re-employment upon their return from the service of their country. That year has long since passed. After its expiration, their continued employment as mechanics depends upon their contract of employment. If the same contract is in effect now, the seniority thereunder which appellants acquired by statute while in the service will continue and entitle them to hold their positions as mechanics over others with less seniority. *But this later right, if it exists, inures to them, after the statutory one-year period, from the contract and not from the statute.* In an action such as this the courts have no power to 'freeze' the contractual rights of the parties or of these appellants to their jobs as mechanics after the statutory one-year period." (Emphasis supplied.)

There is nothing in the Selective Training and Service Act that modifies or alters in any manner the provisions of the Railway Labor Act, 45 U. S. C. §151, *et seq.*, which latter Act requires respondent to contract collectively with the exclusive bargaining representatives selected by its employes; nor can such an implication be drawn from the terms of the Selective Training and Service Act. The rights of the veteran are not frozen by that Act, nor are the duties of the employer. Such rights are at all times a proper subject of full-faith collective bargaining. The veteran

accumulates time toward his seniority while he is in the armed forces. Upon his return from the armed forces he must be given the position which he is entitled to receive with that cumulated seniority. For a period of one year he must not be discharged or demoted from the position afforded him by that seniority. For that one year he may look to the Act for his security in that position. He may look to the Act to secure him in the seniority accumulated by him while he served in the armed forces, but the employment which he must be given is controlled by the employer's circumstances and the collective agreement, except that he must be restored to his old position without loss of seniority and kept there for one year. At the expiration of one year he must look to his contract of employment. If he has no contract of employment, his security as to employment ends with the statutory year. *Fishgold* v. *Sullivan Drydock & Repair Corp., et al., supra; Trailmobile Co., et al.,* v. *Whirls, supra; Aeronautical Industrial Dist. Lodge 727* v. *Campbell, et al., supra.*

The argument of petitioner to the effect that the veterans' rights are frozen by the Act has been answered fully by this Court in the three cases above cited. His argument seems to be a rehash of the argument made in the *Trailmobile Company* case, *supra.* The construction given the Act does not penalize the veteran at the end of one year because of his military service; it does not disadvantage his position because of his military service, nor does it automatically deduct the time he accumulated on his seniority while in the service of the nation. The fact that under the Act the

time he served in the armed forces must be added to the time actually employed in calculating his annuity under the Railroad Retirement Act of 1937, 45 U. S. C. §228a, *et seq.*, does not indicate in any manner that the veteran can look to the Selective Service Act for security in employment after the termination of the one-year statutory period.

CONCLUSION.

Respondent has been placed at a decided disadvantage in presenting its case by reason of the fact that the Solicitor General has presented it along with the *Haynes* case, No. 29, and has treated the cases as only one case so far as the issues and the facts are concerned, except that he does acknowledge that there is in the *Haynes* case a question of back pay which is not at issue in the instant case. In the instant case, in the District Court, all of the facts as to petitioner's employment, the employment of those working with him and the contract of employment were developed. That is not true of the *Haynes* case.

Petitioner attempts to avoid those facts (the real facts which were before the District Court when the action was dismissed) by saying that both cases were dismissed before evidence had been taken (Br. 8) and that the factual allegations of the complaints must be taken as true. That is not true in this case. On the same day that respondent filed its answer, it filed its request for admissions under Rule 36, Federal Rules of Civil Procedure. Rule 36 is one of the rules pro-

mulgated for the purpose of determining the issues and to discover the facts upon which the issues are based. That rule is universally used to determine whether or not there is really an issue of fact to be tried. Even petitioner recognizes that the admissions are properly to be considered. He quotes (Br. 6) from the provisions of the collective bargaining agreement set out in respondent's request for admission No. 23, page 6 of the record, and admitted by petitioner in his response, page 10 of the record.

If the instant case must be decided here by assuming that the factual allegations of the complaint are true, it will be decided upon a false statement of facts and conclusions set out in the complaint. Respondent's request for admissions (R. 4-7) contain all of the facts as to petitioner's employment by respondent, and the facts as to the employment of those with whom he worked, both before and after he served his country. It contains the provisions of the agreement under which petitioner worked. All of those facts were admitted either by petitioner's response (R. 10) or by the uncontroverted affidavit (R. 12) filed in support of respondent's motion for summary judgment pending in the District Court when the action was dismissed.

Those admitted facts entirely refute petitioner's statements in his brief that petitioner is seeking no advantage over non-veteran employes; that non-veteran employes are enjoying superior status; that petitioner's seniority has been reduced by reason of the time he served his country; that the complaint was

dismissed without an examination of rights conferred under the seniority system involved; that in determining the question here involved we must start with the proposition that petitioner was denied the position which his seniority alone entitled him to receive had he not been in military service; that petitioner was discriminated against as a result of his service to the nation; and the various assumed things that he says the dismissal of this action stands for or establishes. The facts presented by the record show, without contradiction, that petitioner was not restored to an inferior position; that his seniority was not reduced, but, on the contrary, he was credited with the entire time he was in the armed forces; that he was restored to his old position without loss of seniority; that he is not entitled to the preferred standing which he claims at Corbin; and that he had no seniority at Corbin before entering the armed forces and could not accumulate seniority at that point while in the armed forces.

Respondent contends that the dismissal of this action was simply a determination by the District Court, upon the whole record before it, that petitioner was restored to the position which he left, without loss of seniority (with cumulated seniority), that the respondent fully complied with the provisions of the Selective Training and Service Act; that the claim of petitioner for seniority at Corbin from a date prior to the day he first worked there is a claim of a "preferred standing" or "superseniority"; that any possible right that petitioner might have had to that "preferred standing" or "superseniority" terminated with the statutory year,

which had elapsed when the action was dismissed; and that there was no factual issue in the case upon which the District Court could have, under the law, granted petitioner the relief demanded by him.

Respondent asks that the judgment of the District Court dismissing the action be affirmed, for the reason that the question at issue was moot when the action was dismissed, and for the further reason that when the action was dismissed by the District Court the facts before the Court established that petitioner had been fully restored to his old position without loss of seniority, and that he had been given all of the rights to which he was entitled under the Selective Training and Service Act.

Respectfully submitted,

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